

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ROBERT A. DANIELS,

Plaintiff,

vs.

MARC S. JENSON, *et al.*,

Defendants.

2:11-cv-00298-ECR-CWH

REPORT & RECOMMENDATION

This matter came before the Court for a Show Cause hearing on October 5, 2012. Defendant JD Medical Holdings (“JD Medical”) filed its answer to Plaintiff’s complaint on March 5, 2012. (#22). The answer was filed through JD Medical’s attorneys of record at the law firm of Shumway Van & Hansen, Chtd.

On May 2, 2012, JD Medical’s attorneys filed a motion to withdraw. (#26). Finding good cause, the Court granted the motion. (#27). The Court further found that JD Medical, as a corporate litigant, “must retain counsel if it intends to continue to litigate this matter. A corporation may appear in federal court only through licensed counsel.” *See* Order (#27) at 2:4-6. JD Medical was granted until May 24, 2012, to advise the Court if it intended to retain new counsel. Further, the Clerk of Court was instructed to serve JD Medical with a copy of Order (#27) at its last known address. JD Medical did not advise the Court if it intended to retain new counsel and no appearance has been made on its behalf. Therefore, on June 19, 2012, Plaintiff filed a motion to strike JD Medical’s answer to Plaintiff’s complaint and requested an entry of default. *See* Pl.’s Mot. (#32). JD Medical did not file a response to the motion.

Accordingly, **Defendant JD Medical Holdings** was ordered to appear before the undersigned United States Magistrate Judge on **Friday, October 5, 2012**, at 2:00 PM in Courtroom 3C, Lloyd D. George U.S. Courthouse, 333 Las Vegas Boulevard South, Las Vegas, Nevada, and show cause why the Court should not impose sanctions, up to and including a recommendation that its answer be stricken and default entered for (1) JD Medical's failure to comply with the Court's Order (#27) requiring it to appear through counsel, and (2) failure to file a response in opposition to Plaintiff's motion to strike (#32). Defendant JD Medical Holdings was expressly warned:

**FAILURE TO APPEAR AT THE OCTOBER 5, 2012 HEARING
WILL RESULT IN A RECOMMENDATION PLAINTIFF'S
MOTION TO STRIKE (#32) BE GRANTED AND DEFENDANT
JD MEDICAL HOLDINGS ANSWER (#22) BE STRICKEN AND
THIS CASE DISMISSED**

See Order (#43) at 2:5-7. The Court further instructed the Clerk of Court to mail a copy of the Order (#43) via certified mail to Defendant JD Medical Holding's last known address. (#45).

The Show Cause hearing went forward on October 5, 2012. Defendant JD Medical did not retain counsel and failed to appear at the hearing. Thus, JD Medical has (1) disregarded the Court's order to retain counsel, (2) failed to respond to Plaintiff's Motion to Strike its answer (#32), and (3) failed to appear at the Show Cause hearing. The Court can only conclude that JD Medical has abandoned its defense of this case and, therefore, will recommend that Plaintiff's motion to strike (#32) be granted.

DISCUSSION

The broad, underlying purpose of the Federal Rules is to "secure the just, speedy, and inexpensive determination of every action and proceeding." *See* Fed. R. Civ. P. 1. It is with that charge as a guide that this Court construes and administers the Federal Rules. The Federal Rules provide several mechanisms whereby courts can accomplish this goal through the use of sanctions against a party that fails to comply with the Federal Rules or unnecessarily multiplies the proceedings. For example, Rule 16 is a central pretrial rule that authorizes court to manage cases "so that disposition is expedited, wasteful pretrial activities are discouraged, the quality of the trial is improved, and settlement is facilitated." *In re Phynylpropanolamine Products*

1 *Liability Litigation*, 460 F.3d 1217, 1227 (9th Cir. 2006). “Subsection (f) puts teeth into these
 2 objectives by permitting the judge to make such orders as are just for a party’s failure to obey a
 3 scheduling or pretrial order, including dismissal.” *Id.* Rule 16(f) specifically provides that “[o]n
 4 motion or on its own, the court may issue any just orders, including those authorized by Rule
 5 37(b)(2)(A)(ii)-(vii), if a party or its attorney: (A) fails to appear at a scheduling or pretrial
 6 conference; (B) is substantially unprepared to participate—or does not participate in good faith—in
 7 the conference; or (C) fails to obey a scheduling order or other pretrial order.” Rule
 8 37(b)(2)(A)(v) provides that: “[i]f a party . . . fails to obey an order to provide or permit
 9 discovery . . . the court where the action is pending may issue further just orders . . . includ[ing]:
 10 . . . dismissing the action or proceeding in whole or in part.”

11 Dismissal for failure to obey a court order or permit discovery is a harsh penalty and
 12 should only be imposed in extreme circumstances. *Malone v. U.S. Postal Serv.*, 833 F.2d 128,
 13 130 (9th Cir. 1987). Courts weigh the following five factors when determining whether to
 14 dismiss a case for failing to comply with a court order: “(1) the public’s interest in expeditious
 15 resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the
 16 defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the
 17 availability of less drastic sanctions.” *In re Phynylpropanolamine Products Liability Litigation*,
 18 460 F.3d at 1226 (internal citations and quotations omitted). “These factors are not a series of
 19 conditions precedent before the judge can do anything, but a way for the district judge to think
 20 about what to do.” *Id.* (citing *Valley Eng’rs v. Elec. Eng’g Co.*, 158 F.3d 1051, 1057 (9th Cir.
 21 1998). Although preferred, it is not required that the district court make explicit findings to show
 22 that it has considered these factors. *Id.* A dismissal sanction will only be overturned if the
 23 reviewing court is left with “a definite and firm conviction that it was clearly outside the
 24 acceptable range of sanctions.” *Id.* (internal citations and quotations omitted).

25 **1. Expeditious Resolution of Litigation**

26 “Orderly and expeditious resolution of disputes is of great importance to the rule of law.
 27 By the same token, delay in reaching the merits, whether by way of settlement or adjudication, is
 28 costly in money, memory, manageability, and confidence in the process.” *In re*

1 *Phynylpropanolamine Products Liability Litigation*, 460 F.3d at 1227. Here, the Plaintiff has
2 failed to comply with several court orders and failed to appear to at a show cause despite having
3 notice and being expressly warned that failure to appear would result in a recommendation for
4 default. This behavior is inconsistent with Rule 1's directive to "secure a just, speedy, and
5 inexpensive" determination of this action.

6 **2. Court's Need to Manage Its Docket**

7 It has long been recognized that the court's inherent power to control its docket includes
8 the ability to issue sanctions of dismissal where appropriate. *Thompson v. Housing Authority of*
9 *Los Angeles*, 782 F.2d 829, 831 (9th Cir 1986) (citation omitted). As the Supreme Court has
10 held, the sanction of dismissal "must be available to the district court in appropriate cases, not
11 merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter
12 those who might be tempted to such conduct in the absence of such a deterrent." *National*
13 *Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

14 Here, Defendant JD Medical failed to appear at the October 5, 2012 hearing and has
15 disregarded the Court's order to appear through counsel if it wished to continue defending the
16 case. *See U.S. v. High Country Broad. Co., Inc.*, 3 F.3d 1244, 1245 (9th Cir. 1993). Each of
17 these failures has occurred despite JD Medical being on notice that failure to comply may result
18 in dismissal. It appears that Defendant is ignoring, avoiding, or otherwise refusing to comply
19 with the Court's orders. This despite several attempts made by the Court to allow JD Medical to
20 defend in this matter. JD Medical has not provided valid justification for its failures to comply
21 with Court orders or to appear at hearings. These failures have thwarted the advancement of this
22 case making it difficult for the Court to effectively manage its docket.

23 **3. Risk of Prejudice**

24 The actions of an opposing party that impair the ability to go to trial or interferes with the
25 rightful decision of the case are prejudicial. *Cf. Adriana Intern. Corp. v. Thoeren*, 913 F.2d
26 1406, 1413 (9th Cir. 1990). JD Medical has refused to participate in this case through the willful
27 violation of several Court orders. This refusal to participate in the litigation or comply with the
28 Court's order is highly prejudicial and certainly impairs the ability of Plaintiff to go to trial and

interferes with the rightful decision of the case.

4. Public Policy

“[T]he public policy favoring disposition of cases on their merits strongly counsels against dismissal.” *In re Phynylpropanolamine Products Liability Litigation*, 460 F.3d at 1228 (citation omitted). Although this factor may cut against dismissal it is not enough, standing alone, to prevent dismissal.

5. Less Drastic Sanctions

The Court must consider the adequacy of less drastic sanctions before imposing dismissal. *Malone*, 833 F.2d at 131 (citation omitted). Three questions facilitate this analysis: (1) are less drastic sanctions available and, if so, why would they be inadequate; (2) were alternative sanctions employed prior to ordering dismissal; and (3) was the party subject to dismissal warned of the possibility of dismissal. *Id.* at 132. Less drastic sanctions would not be effective in this case as JD Medical has repeatedly demonstrated its willingness to ignore court orders or appear through counsel. The Court has made every effort to avoid entering dismissal, including permitting JD Medical to cure its prior failures to appear by appearing at the show cause hearing. Despite the warning that failure to appear would result in dismissal, JD Medical did not appear at the hearing and continues to frustrate advancement of this case.

Based on the foregoing and good cause appearing therefore,

RECOMMENDATION

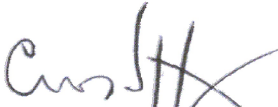
IT IS HEREBY RECOMMENDED that Defendants’ Motion to Strike (#32) be **granted**.

NOTICE

Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's

1 order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d
2 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir.
3 1983).

4 DATED this 8th day of October, 2012.

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8 C.W. Hoffman, Jr.
United States Magistrate Judge
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